IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1319 OF 1994

1. Jayantilal Thakkar & Company.

2. Shri Dilip J. Thakkar. ... Petitioners.

V/s.

1. Union of India.

2. The Collector of Central
Excise, Delhi. ... Respondents.

WITH
WRIT PETITION NO. 1320 OF 1994

1. Lodha & Co. C.A.

2. Shri Nand Kirshore Bafna. ... Petitioners.

V/s.

1. Union of India.

2. The Collector of Central
Excise, Delhi. ... Respondents.

D.B.Shroff with Sheeraz Rustamjee i/b.
Bhai Kanga & Girdharlal for the petitioners.

R.V.Desai, senior counsel with Mrs.S.M.Shah
for the respondents.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 16th March, 2005.

JUDGMENT : (Per V.C.Daga, J.)

. Whether Auditors of the Company could be subjected to the action under section 9(1)(bbb) of the Central Excise and Salt Act, 1944 ("Act" for

short) Act read with rule 209A of the Central Excise Rules ("said Rules" for short) framed under the provisions of the Act is the question involved in these petitions. Since the common questions of law and fact arise in both petitions, the same were heard together and are being disposed of by this common judgment. The parties are referred to in their original capacity, however, facts are drawn from Writ Petition No.1319 of 1994 (Jayantilal Thakkar & Co. v. Union of India)

Factual Matrix :
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2. The first petitioner is a firm of Chartered Accountants engaged, inter alia; in the auditing of accounts of various companies. The second petitioner is a partner in the first petitioner firm.

3. The respondent No.2 - Collector of Central Excise in exercise of powers and functions, inter alia; under the provisions of the Act issued six show cause notices to the petitioners alleging that in the course of audit of M/s.G.T.C. Industries Ltd. (G.T.C.), a tobacco manufacturing company, the petitioners after having examined relevant documents deliberately certified the books of accounts of

G.T.C. to be true and correct in spite of noticing removal of more than one consignment of cigarettes under different invoices bearing same serial number and different delivery challans also bearing same serial number but paid central excise duty for one consignment of cigarettes removed under one set of documents out of the above. It is, thus, alleged that the first petitioner had, prima facie; dealt with the excisable goods, which they were knowing and had reason to believe, are liable for confiscation under the Act or the said Rules, consequently the petitioner - firms have rendered themselves liable for penal action under rule 209A of the said Rules.

4. The aforesaid show cause notices (six numbers) issued to both the petitioner firms carrying similar allegations and charges are subject matter of challenge in these petitions filed under Article 226 of the Constitution of India.

Submissions :

5. At the outset, Mr.R.V.Desai, learned senior counsel appearing for the Revenue raised a preliminary objection to the maintainability of the petitions contending that the show cause notices are open to challenge before the writ court only on the

ground that even if the facts are assumed to be correct no case is made out against the noticees. According to him, no such case has been made out in these petitions. Apart from this, Mr.Desai submits that by no means the notices in question could be said to be non-est in the eye of law since they were issued by the authorities having jurisdiction to issue such notices. He submits that the petitioners can reply to the show cause notices and contend before the adjudicating authority that the show cause notices suffer from the jurisdictional error. He, thus, submits that these writ petitions are liable to be dismissed. Mr.Desai placed reliance on the Apex Court judgment in the case of **Special Director v. Mohd. Ghulam Ghouse**; 2004 (164) ELT 141 (SC); **Union of India v. Hindalco Industries**; (2003) 5 SCC 194 and **Garware Plastics & Polyester Ltd. v. Union of India**; 1986 (24) ELT 449 (Bom) in support of his submissions.

6. Mr.Desai, at the cost of repetition urged that if the Authorities have a jurisdiction to issue notices, then, it also has the jurisdiction to adjudicate upon the legality of such notices, consequently, the question of legality of the notices should be left to the departmental adjudicating authorities and that this Court should

not test the legality of the said notices in the present writ petition.

7. Mr.Shroff, learned counsel for the petitioners in reply, submitted that after having allowed the petitions to remain pending for about 13 years in this Court it would not be proper on the part of this Court not to adjudicate upon the legality of the show cause notices and to relegate the petitioners to the whims of the adjudicating authority. He further submitted that so far as the show cause notices are concerned, these notices are totally unsustainable and clearly unfounded in eye of law for absolute want of jurisdiction. None of the notices issued stands to the test of legal requirements of rule 209A of the Rules as such these writ petition were not only rightly admitted by this Court but the respondents were injuncted from proceeding with the show cause notices. In his submission, all the notices are liable to be quashed and set aside. He submits that the respondents cannot be allowed to proceed with adjudication of defective notices. He took us through the contents of the notices to demonstrate as to how they do not answer the essential requirements of rule 209A of the Rules.

Statutory Provisions:
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8. Before proceeding to consider the rival submissions of the parties it will be profitable to have a glance at the statutory provisions applicable to the facts of these petitions.

Section 9(1)(bbb) of the Act reads as under:

> "**9. Offences and penalties. -** (1) Whoever commits any of the following offences, namely:-
>
> (a) ... ...
> (b) ... ...
> (bb) ... ...
>
> (bbb) acquires possession of, or in any way concerns himself in transporting, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under this Act or any rule made thereunder.

Rule 209 of the said Rules reads as under:

> "**Rule 209A. Penalty for certain offences.-** Any person who acquires possession of, or is any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

Consideration :
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9. It is true that in large number of cases the Apex Court has deprecated the practice of the High

Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with participation and in the presence of parties. Unless, the High Court is satisfied that show cause notice was totally non-est in the eye of law for absolute want of jurisdiction of the authority to investigate into the facts, writ petitions should not be entertained for the mere asking and as a matter of routine and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition.

10. The position regarding the course to be adopted by the Courts when alternate remedy is available is also fairly well-settled. If a show cause notice is issued by a statutory authority relying upon some facts, the said notice can be challenged before the Writ Court only on the ground that even if the facts are assumed to be correct no case has been made out against the noticee. If a prima facie case has been made out in the show cause notice, it is for the adjudicating authority to finally decide all the questions including the questions of fact. It has also been laid down in series of cases by the Supreme Court that the High

Court should not interfere at the stage of show case notice to take over the fact finding investigation which is to be resolved by fact-finding authorities constituted under the relevant statute. In a series of recent cases, the Supreme Court has taken the aforesaid view. Some reported cases are : **State of Goa v. Leukoplast (India) Ltd.** - 1997 (92) ELT 19 (SC) = AIR 1997 SC 1875; **Union of India v. Polar Marmo Agglomerates Ltd.** - 1997 (96) ELT 21 (SC); and **Union of India v. Bajaj Tempo Ltd.** - 1997 (94) ELT 285 (SC). In **State of U.P. v. Labh Chand** - AIR 1994 SC 754, the Supreme Court befittingly illuminated the power as under:

> "When a statutory Forum or Tribunal is specially created by a statute for redressal of specified grievances of persons on certain matters, the High Court should not normally permit such persons to ventilate their specified grievances before it by entertaining petitions under Article 226 of the Constitution is a legal position which is too well settled....."

In **State of A.P. v. T.G.Lakshmaiah Setty & Sons** - AIR 1994 SC 2377, the above decision was reiterated by the Supreme Court and it was observed that the orders of assessment rendered under tax laws should be tested under the relevant Act and in no other way. In **Shyam Kishore v. Municipal Corporation of Delhi** - AIR 1992 SC 2279, it was observed that recourse to writ petition is not proper, when more satisfactory solution is available on the terms of

the statute itself. The position is, therefore, clear that extraordinary and discretionary power under writ jurisdiction should be exercised with caution when statutory remedy is sought to be by-passed.

11. In **Rashid Ahmed v. Municipal Board, Kairana** - AIR 1950 SC 163, the Apex Court laid down that existence of an adequate legal remedy is a factor to be taken into consideration in the matter of granting writs. This view has been followed in another case, namely, **K.S.Rashid & Sons v. The Income Tax Investigation Commissioner** - AIR 1954 SC 207; wherein the Apex Court reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words "unless there are good ground therefor", which indicated that alternate remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

12. Specific and clear rule has been laid down in **State of U.P. v. Mohd. Nooh 1958 SCR 595**; AIR 1958 SC 86, as under:

> "But this rule requiring the exhaustion of statutory remedies before the Writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

13. With the above settled position of law, the question needs consideration is: whether the show cause notices can be said to be totally non-est in the eye of law. Whether it can be said that even if the facts stated in the notices are assumed to be correct; no case has been made out against the noticees. In other words, can it be said that a prima facie case has been made out in the show cause notices. If yes, then, it is for the adjudicating authority to finally decide all the questions including the questions of fact.

14. Let us now, turn to the text of the statutory provisions to answer the questions raised hereinabove. The proper dissection of the statutory provisions categorically demonstrate that the basic requirement is that the person charged must deal with the excisable goods either by acquiring possession thereof or by transporting, or by concealing or selling or purchasing or in any other manner dealing with it with the knowledge or with a

reason to believe that the goods dealt with by him are liable for confiscation under the Act or the Rules.

15. With the above understanding of statutory provisions, let us turn to the show cause notices at hand. The relevant text of one of the specimen notices is reproduced hereinbelow:-

OFFICE OF THE COLLECTOR OF CENTRAL EXCISE,
DELHI ROOM NO.273, C.R.BUILDING, I.P.ESTATE,
NEW DELHI.

C.No.V(24)15/3/CCE/DLI/Adj/94

Dated: 25.3.94

SHOW CAUSE NOTICE

1. ... ...

2. ... ...

3. ... ...

4. ... ...

5. ... ...

6. ... ...

6. In view of the foregoing, it appears that:

(i) ... ...

(ii) ... ...

(iii) ... ...

(iv) ... ...

(v) ... ...

(vi) It further appears that M/s.Lodha & Company Bombay and M/s.Jayanti Lal Thakkar &

> Company, Chartered Accountants of GTC have deliberately certified the books of accounts of GTC to be true inspite of noticing identical invoices/delivery challans raised by the franchise units of GTC and existence of these documents in the GTC records, one invoice under the cover of original GP-1 and other invoice of same serial number under the cover of zerox copy of the same GP-1 and then discounting of both from different banks and other financial institutions. From Balance sheets of GTC for the years 1988-89 to 1991-92 and schedules Annexed thereto, it appears that the above named Chartered Accountants had examined all such reasons. It appears that by dealing in this manner the records of GTC checked by them in relation to the transactions of cigarettes which were apparently removed clandestinely by the franchise units of GTC and which were purchased by GTC, the above; named - Chartered Accountants have prima facie dealt with these excisable goods which they knew or had reasons to believe are liable to confiscation under the said Act or the Rules made thereunder & thereby they have rendered themselves liable for penal action under Rule 209A of the said Rules.

The above text of the notice nowhere made out a case that the petitioners in any way; at any time; had handled the excisable goods muchless dealt with the same with knowledge as required under rule 209A of the Rules. If that be so, the question of knowledge or reason to believe that the goods dealt with by them were liable to be confiscated under the Act or Rules did not arise at all. The show cause notices and the allegations made therein do not answer the mandatory requirement of section 9(1)(bbb) of the Act or of the rule 209A of the Rules.

16. It is too much to allege or to presume that the advocates or the legal advisers or auditors of the company to handle muchless deal with the excisable goods as contemplated under section 9(1)(bbb) of the Act or rule 209A of the Rules while discharging their professional duties. The cases at hand are the cases wherein the show cause notices are absolutely without jurisdiction muchless they do not make out any case of any of the noticees having dealt with the excisable goods with specific knowledge so as to stand to the test of either section 9(1)(bbb) of the Act or rule 209A of the Rules as such each show cause notice, in our opinion, is non-est and liable to be quashed and set aside.

17. The additional material sought to be produced by way of additional affidavit to supplement show cause notices cannot be used to remove the defects of the show cause notices. It is needless to mention that when the statutory functionary makes an order based on certain grounds, its validity is required to be judged by reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise as held by the Apex Court in the case of **Mahendrasing Gill v. Chief Election Commissioner**- AIR 1978 SC

851. This settled principle of law is applicable with little greater force to the show cause notice because each allegation made in the show cause notice is required to be replied specifically by the noticee and entire matter is required to investigated on the basis of the show cause notice and reply thereto. Issuance of show cause notice with material facts and particulars is a basic requirement of principles of natural justice. Underlying the rules of natural justice is to prevent miscarriage of justice and secure fair play in action. Thus, the show cause notice must contain all necessary allegations with material particulars forming cause of action for the action initiated. The contents of show cause notice, thus, cannot be supplemented by an additional affidavit, especially, when the legality of the show cause notice is being tested in the court of law. Of-course, issuance of additional or supplementary show cause notice may be permissible in a given case subject to the compliance of law for the time being in force but, certainly, not the affidavit at the stage when the matter is in the Court for judicial scrutiny; of the very same show cause notice.

18. So far as the submission to relegate the parties to the departmental adjudication is

concerned, the submission at this stage is misplaced. In our view, having entertained these petitions; on merits this Court will not be justified in dismissing them as not maintainable on the ground of not availing alternate remedy of departmental adjudication, that too, after having noticed glaring illegality in the show cause notices impugned in these petitions. (see **Hirday Narain v. I-T.Officer, Bareilly** - AIR 1971 SC 33)

19. In the result, impugned show cause notices are quashed and set aside. Petitions are allowed. Rule is made absolute in both petitions in terms of prayer clause (a) with no order as to costs.

(V.C.Daga, J.)

(J.P.Devadhar, J.)